

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In Re: MATTHEW MARK HIGGINS,  
AMY BETH HIGGINS,

Bankruptcy Case No.: **03-36033 DDO**  
Chapter 7

Debtors.

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CHARLES W. RIES, TRUSTEE,

Plaintiff,

v.

Adversary Case No.: **04-3247 DDO**

ROCHESTER MOTOR COMPANY,  
dba ROCHESTER FORD, and  
AFFINITY PLUS FEDERAL CREDIT UNION,

Defendant.

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**MEMORANDUM IN SUPPORT OF DEFENDANT AFFINITY PLUS FEDERAL  
CREDIT UNION'S MOTION FOR SUMMARY JUDGMENT**

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TO: THE ABOVE-NAMED COURT AND CHARLES W. RIES, TRUSTEE AND PLAINTIFF,  
THROUGH HIS ATTORNEY, CHARLES W. RIES, ESQ., UNION SQUARE BUSINESS  
CENTER, SUITE 200, 201 NORTH BROAD STREET, POST OFFICE BOX 7, MANKATO,  
MINNESOTA 56002-0007, PURSUANT TO RULE 7004(b)(9).

**INTRODUCTION**

Defendant Affinity Plus Federal Credit Union, individually submits this memorandum in support of its Motion for Summary Judgment against Plaintiff in the above-captioned case. Defendant Affinity Plus Federal Credit Union asserts that it is entitled to summary judgment as a matter of law, pursuant to Rule 7056 F.R.Civ.P.

Plaintiff has brought action against Defendant Rochester Motor Company, dba Rochester Ford and Defendant Affinity Plus Federal Credit Union and seeks: determination that an alleged

transfer of \$4,000.00 constitutes both a transfer in interest of property of the Debtors and a preference; avoidance of the alleged transfer as preferential; an award of judgment against Defendants for \$4,000.00; an award of attorneys fees<sup>1</sup>, costs and disbursements; and other relief as is just and proper. Plaintiff bases his cause of action on 11 U.S.C. §§547, 550 and 551.

Firstly, Plaintiff must prove that the alleged transfer of \$4,000.00 actually occurred. Secondly, pursuant to 11 U.S.C. §547, with respect to his claim, Plaintiff must prove that the alleged payment was: 1) to or for the benefit of a creditor; 2) on account of an antecedent debt owed by the debtors before the transfer was made; 3) made while the debtors were insolvent; 4) made on or within 90 days before the date of the filing of the petition; and 5) enabled the Defendants to receive more than they would have received pursuant to a distribution under Chapter 7 if the transfer had not been made. Lastly, with respect to Defendant Affinity Plus Federal Credit Union specifically, Plaintiff must also rebut Defendant Affinity Plus Federal Credit Union's assertion that the application of the "earmarking" doctrine is determinative of the issues related to Affinity Plus Federal Credit Union in this case.

Plaintiff lacks essential elements to support its claim under 11 U.S.C. §547, and, further, cannot rebut that the earmarking doctrine applies in this case as relates to Defendant Affinity Plus Federal Credit Union, and therefore cannot prevail in his action against Defendant Affinity Plus Federal Credit Union. Accordingly, Defendant Affinity Plus Federal Credit Union seeks an order for summary judgment in its favor.

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<sup>1</sup> Plaintiff has now withdrawn his claim for fees.

## **LEGAL ISSUE**

**DOES A GENUINE ISSUE OF MATERIAL FACT EXIST?**

## **DOCUMENTS IN THE RECORD**

### **I. PLEADINGS**

- A. Plaintiff's Complaint
- B. Defendant Affinity Plus Federal Credit Union's Answer and Defenses
- C. Defendant Rochester Motor Company, dba Rochester Ford's Answer and Defenses
- D. Defendant Affinity Plus Federal Credit Union's Notice of Additional Defense

### **II. AFFIDAVITS**

- A. Affidavit of Jodi Schramel in support of Defendant Affinity Plus Federal Credit Union's Motion for Summary Judgment.
- B. Affidavit of Derrick N. Weber in support of Defendant Affinity Plus Federal Credit Union's Motion for Summary Judgment with attached exhibits.

## **STATEMENT OF FACTS**

On August 4, 2003, thirty days before filing bankruptcy, Debtor Matthew Mark Higgins entered into a contract to trade the 2001 Mazda 626 for \$7,250.00, the note for which was held by Defendant Affinity Plus Federal Credit Union and co-signed by both Matthew Mark Higgins and Randy A. Higgins, and together with Debtor Amy Beth Higgins co-signed the note held by Rochester Ford for the financing and purchase of a 2003 Ford Escort ZX2. In the terms of the contract, as is standard business practice, Rochester Ford agreed to advance payment to Defendant Affinity Plus Federal Credit Union in the full amount owing by Debtor Matthew Mark Higgins and non-filing co-signor Randy A. Higgins for release of the lien on the 2001 Mazda 626.

On August 12, 2003, shortly after the trade, Defendant Affinity Plus Federal Credit Union received a check from Rochester Ford-Toyota in the sum of \$16,669.00, pursuant to and in execution of the terms of the trade, for payment in full of the debt owed by Matthew and Randy Higgins and release of its lien on the 2001 Mazda 626.

On August 12, 2003, Defendant Affinity Plus Federal Credit Union posted the monies to the account of Matthew Mark Higgins and Randy A. Higgins, and released its lien on the 2001 Mazda 626.

On September 3, 2003, Debtors Matthew Mark Higgins and Amy Beth Higgins filed for joint chapter 7 bankruptcy relief, listing an exemption for the 2003 Ford Escort on their Schedule C, pursuant to 11 U.S.C. §522(d)(2), and also, in their Statement of Financial Affairs, stating their intent to surrender the vehicle. Plaintiff/Trustee did not object to the Debtors exemption.

On May 4, 2004, Plaintiff filed its Complaint against both Defendant Rochester Motor Company, dba Rochester Ford and Defendant Affinity Plus Federal Credit Union seeking: determination that an alleged transfer of \$4,000.00 constitutes both a transfer in interest of property of the Debtors and a preference; avoidance of the alleged transfer as preferential; an award of judgment against Defendants for \$4,000.00; an award of attorneys fees, costs and disbursements; and other relief as is just and proper.

On May 19, 2004, Defendant Affinity Plus Federal Credit Union filed and served its Answer to Plaintiff's Complaint in this matter.

On June 4, 2004, Defendant Rochester Motor Company, dba Rochester Ford filed its Answer to Plaintiff's Complaint in this matter.

On June 25, 2004, Defendant Affinity Plus Federal Credit Union served its Request for Admissions, Interrogatories, and Requests for Production of Documents upon Plaintiff.

On June 29, 2004, Defendant Affinity Plus Federal Credit Union filed and served Notice of Additional Defense specifically and affirmatively pleading the earmarking doctrine in its defense against the Plaintiff's claims.

On June 30, 2004, Defendant Affinity Plus Federal Credit Union received Trustee's Interrogatories to Defendants and Requests for Production of Documents to Defendants.

On July 23, 2004, Defendant Affinity Plus Federal Credit Union served its Response to Trustee's Interrogatories to Defendant and Requests for Production of Documents.

Plaintiff's responses to Defendant Affinity Plus Federal Credit Union's Request for Admissions, Interrogatories, and Requests for Production of Documents to Plaintiff establish that Plaintiff cannot prove his case. The same are non-responsive and evasive. There are virtually no facts in dispute in this case, thus, a summary judgment is appropriate.

#### **STANDARD OF REVIEW**

This case is ripe for Summary Judgment because there are no genuine issues of material fact and by granting summary judgment in favor of Defendant Affinity Plus Federal Credit Union, the Court will avoid unnecessary litigation. Summary judgment is proper where there is no actual dispute over the material facts, but rather issue remains over the legal consequences of the undisputed facts.

## ARGUMENT

### NO GENUINE ISSUE OF MATERIAL FACT EXISTS

- A. PLAINTIFF HAS RAISED A CLAIM OF PREFERENCE AGAINST DEFENDANT AFFINITY PLUS FEDERAL CREDIT UNION PURSUANT TO 11 U.S.C. §547.

**1. PLAINTIFF CANNOT ESTABLISH A §547 PREFERENCE CLAIM**

A preference claim as asserted by the Plaintiff is an avoidable transaction; it is not automatically void. Pursuant to 11 U.S.C. §547(b), Plaintiff/Trustee must prove five factors by filing an Adversary Complaint:

The trustee may avoid any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made on or within 90 days before the filing of the petition; and
- (5) that enables such creditor to receive more than such creditor would receive if the case were under chapter 7 of this title.

The Plaintiff has the burden of proof for each of the five factors. 11 U.S.C. §547(g); *Brown v. First Nat'l Bank of Little Rock*, 748 F.2d 490, 491 (8<sup>th</sup> Cir. 1984).

Defendant Affinity Plus Federal Credit Union stipulated in its Answer to Plaintiff's Complaint that within 90 days before the date of the filing of the petition, it received a check in the sum of \$16,669.00 tendered by Rochester Ford-Toyota to satisfy its lien against the 2001 Mazda 626, thereby permitting its use for a trade-in, and release Debtor Matthew Higgins and non-filing co-signor Randy Higgins from their obligation to Defendant Affinity Plus Federal Credit Union for the purchase and financing of the 2003 Ford Escort ZX2.

Defendant Affinity Plus Federal Credit Union also asserted in its Answer, however, that at least as relates to Defendant Affinity Plus Federal Credit Union, the Plaintiff cannot establish factors 3), or 5) of 11 U.S.C. §547, as enumerated above herein: with respect to the solvency of the Debtors at the time of the alleged transfer and according to the Debtors' sworn bankruptcy petition and Plaintiff's complaint at the time of the alleged transfer, Debtor Amy Beth Higgins' income was "substantially" higher and the Debtors were liquid at least in the amount of \$4,000.00, the sum of their alleged down-payment on the 2003 Ford Escort ZX2; and, in the event that the trade had not taken place, subsequent the Debtors' bankruptcy filing, Defendant Affinity Plus Federal Credit Union would have still had full recourse against the non-filing co-signor, Randy A. Higgins, for the remaining balance on the note until paid in full and, therefore, Defendant Affinity Plus Federal Credit Union did not receive more than it would have received if the case were under chapter 7 of this title.

Plaintiff's response to inquiries regarding Debtors' solvency establishes that the Plaintiff has no information to dispute or even prove Debtors' solvency:

**REQUEST FOR ADMISSION NO. 5:** Admit that at the time of the bankruptcy filing, Debtors were solvent.

**RESPONSE:** Plaintiff denies based upon information and belief the Debtors were solvent and further, pursuant to 11 U.S.C. §547(f) the Debtors are presumed to be insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

**INTERROGATORY NO. 8:** State with specificity the depth into which the Debtors' entire household income, from all sources beginning March 2003 to present, as claimed in their bankruptcy, has been examined, and the findings of the examination, including but not limited to:

- a) Debtor Amy Beth Higgins' income derived from her employment at Mayo Clinic, and her reasons for terminating her employment at Mayo Clinic;
- b) Debtor Amy Beth Higgins' employer at the time of the bankruptcy filing and the income derived from said employer;

- c) Debtor Matthew Mark Higgins' last place of employment, his last date employed, and monthly income derived from last full month of employment;
- d) Dates and events related to Debtor Matthew Mark Higgins' unemployment;
- e) Any disability insurance, social security, workers' compensation, unemployment, union, pension, etc., benefits received;
- f) The reasons for any increase or decrease in the Debtors' income; and
- g) Identification of all documents that support the Debtors' income.

**ANSWER:** Plaintiff refers Defendant to the Debtors' bankruptcy schedules.

**DOCUMENT REQUEST NO. 5:** Any and all documentary evidence, copies of any bills, receipts, or statements to support the Debtors' calculation of their household's monthly living expenditures from March 2003 to present, whether as asserted on their Schedule J or during the examination of the Trustee at the Meeting of Creditors, or otherwise.

**ANSWER:** None.

**DOCUMENT REQUEST NO. 6:** All documents related to the Debtors' employment including but not limited to payroll summaries and sick and vacation leave for the period beginning March 2003 to present, including Debtor Ms. Higgins' employment with Mayo Clinic.

**ANSWER:** None.

Insolvency must be established as of the time of the transfer, not at the time of the debtor's bankruptcy filing. Chapter 7 debtors' schedules are not persuasive, dispositive or controlling on question of insolvency at time of alleged preferences. *Burdick v. Lee*, D.Mass. 2001, 256 B.R. 837. Debtor's schedules are not persuasive, let alone dispositive or controlling, on question of debtor's solvency at time of challenged preferential transfers; rather, reliance should be placed on more accurate measures of value of debtor's assets, including current appraisals, opinion value testimony, or price at which assets were sold. *In re Schwinn Bicycle Co.*, Bankr. N.D.Ill. 1996, 192 B.R. 477. Market value of both debtor's assets and liabilities



determines debtor's solvency for preference-avoidance purposes. *In re Schwinn Bicycle Co.*, Bankr. N.D.Ill. 1996, 192 B.R. 477. Furthermore, the debt in question herein included a non-filing co-signor who was likely solvent.

In this case, accordingly, the Plaintiff's claim against Defendant Affinity Plus Federal Credit Union must fail.

**2. PLAINTIFF CANNOT REBUT DEFENDANT AFFINITY PLUS FEDERAL CREDIT UNION'S "EARMARKING DOCTRINE" DEFENSE**

The Plaintiff's claim is barred by the Earmark Doctrine pursuant to the Court's ruling in *In re Bohlen Enterprises, Ltd.*, 859 F.2d 561, 565, 18 Bankr. Ct. Dec. (CRR) 672, 19 Collier Bankr. Cas. 2d (MB) 986 (8<sup>th</sup> Cir.1988). The facts of the present case meet the specific criteria set forth in *Bohlen* to allow Defendant Affinity Plus Federal Credit Union to apply the earmarking defense in this matter: Debtor Matthew Mark Higgins held an interest in the 2001 Mazda secured by a note held by Defendant Affinity Plus Federal Credit Union (old creditor) which was transferred/released to Rochester Ford (new creditor/lender) upon its payoff of the debt owed by Matthew Mark Higgins and Randy A. Higgins to Affinity Plus Federal Credit Union in execution of the terms of the new contract agreement between Rochester Ford and the Debtors, Matthew and Amy Higgins, for the financing and purchase of the 2003 Ford Escort ZX2. The new funds, in the form of a check from Rochester Ford-Toyota, dated August 5, 2003, payable to Affinity Plus Credit Union in the sum of \$16,669.00, were advanced by the new creditor, Rochester Ford, for the benefit of the Debtors and for the purpose of paying the pre-existing obligation owed to the old creditor. The Debtors exercised no control over the disposition of the "earmarked" funds from Rochester Ford-Toyota to Affinity Plus Federal Credit Union.

As previously noted, at the time of the transaction, the retail market value of the 2001 Mazda was at least \$9,500.00<sup>2</sup>, and \$16,669.00 remained owing on the respective note held by Defendant Affinity Plus Federal Credit Union; the retail market value of the 2003 Ford Escort ZX2 is listed by Debtors in their petition as \$15,000.00 with a total claim of \$20,000.00 held by Chase Automotive Finance. In their transaction with Rochester Ford, Debtors exchanged "like-for-like" debt and "like-for-like" assets; hence the trade did not impact their prior debt-to-asset ratio or otherwise result in any diminution of the Debtors' estate. Furthermore, the structure of duties and rights, debts and assets, did not change due to the transaction, and both Rochester Ford-Toyota, the new creditor, and Affinity Plus Federal Credit Union, the old creditor, would have enjoyed the same priority status within the Bankruptcy Code.

In this case, accordingly, the Plaintiff's claim against Defendant Affinity Plus Federal Credit Union must fail.

### **CONCLUSION**

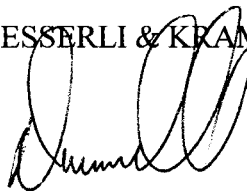
Defendant Affinity Plus Federal Credit Union requests that summary judgment be granted in its favor as no material fact issue exists. Defendant Affinity Plus Federal Credit Union has established that the Plaintiff cannot meet his burden to prove each of the five factors as is required by 11 U.S.C. §547(b), and further, that the "earmarking doctrine" is applicable in this case as it applies to the circumstances relating to Defendant Affinity Plus Federal Credit Union.

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<sup>2</sup> Plaintiff incorrectly used the trade-in value of \$7,250.00 in his Complaint, rather than the actual *retail value* of \$9,500.00.

Dated: August 20, 2004.

MESSERLI & KRAMER, P.A.



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